



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 26, 2019

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2019-17407

Dear Ms. Parker:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 772238.

The Texas Department of Transportation (the "department") received four requests from three requestors for proposals, evaluations, scoring sheets, and contracts related to a specified request for proposals. You state the department has released some information. You claim portions of the submitted information are excepted from disclosure under section 552.139 of the Government Code. Additionally, you state release of portions of the submitted information may implicate the proprietary interests of HCL America, Inc. ("HCL") and NTT Data, Inc. ("NTT"). Accordingly, you state, and provide documentation showing, the department notified HCL and NTT of the request for information and of their rights to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from HCL and NTT. We have considered the submitted arguments and reviewed the submitted information.

NTT generally asserts that some of its information is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 611 at 1 (1992)

(common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). NTT has not directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. Therefore, we conclude the department may not withhold any of the information at issue under section 552.101 of the Government Code.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). HCL and NTT assert portions of the submitted information are protected under section 552.104 of the Government Code. *See* Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co.*, 466 S.W.3d 831. HCL and NTT state they have competitors. In addition, HCL and NTT state the information at issue, if released, would give their competitors an advantage in future bidding situations. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839. After review of the information at issue and consideration of the arguments, we find HCL and NTT have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information we indicated under section 552.104(a) of the Government Code.¹

HCL and NTT argue portions of their information are confidential under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets obtained from a person and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

¹As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.² RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

Section 552.110(b) of the Government Code protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]"

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

NTT asserts portions of its remaining information at issue constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude NTT has failed to establish a *prima facie* case that any portion of its remaining information at issue meets the definition of a trade secret. We further find NTT has not demonstrated the necessary factors to establish a trade secret claim for its remaining information at issue. *See* ORD 402. Therefore, the department may not withhold any of the remaining information under section 552.110(a) of the Government Code.

HCL and NTT also argue some of their remaining information consists of commercial or financial information, the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. We note HCL and NTT were the winning bidders in this instance. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* ORD 514; *see generally* Dep't of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). In addition, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3); ORD 541 at 8. Upon review, we find NTT has established a portion of its information at issue constitutes commercial or financial information, the release of which would cause competitive injury to NTT. Accordingly, the department must withhold the information we indicated under section 552.110(b) of the Government Code. However, we find HCL and NTT have not established their remaining information at issue constitutes commercial or financial information the disclosure of which would cause HCL or NTT substantial competitive harm. Accordingly, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.139 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report;

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use;

(3) a photocopy or other copy of an identification badge issued to an official or employee of a governmental body; and

(4) information directly arising from a governmental body's routine efforts to prevent, detect, investigate, or mitigate a computer security incident, including information contained in or derived from an information security log.

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides, in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a governmental entity;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). You assert the information at issue contains detailed information regarding the department's network security environment. You argue the information at issue reflects security risks and reveals security vulnerabilities. You argue release of the information at issue could be used to aid someone planning an attack on the department's technology systems. Based on your representations and our review, we find the information you marked relates to computer network security, and the design, operation, or defense of the department's computer network. Accordingly, the department must withhold the information you marked under section 552.139 of the Government Code.

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records

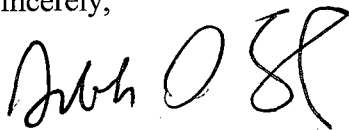
that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department may withhold the information we indicated under section 552.104(a) of the Government Code. The department must withhold the information we indicated under section 552.110(b) of the Government Code. The department must withhold the information you marked under section 552.139 of the Government Code. The department must release the remaining information, however, any information that is subject to copyright may be released only in accordance with copyright law.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Deborah Southerland
Attorney
Open Records Division

DS/be

Ref: ID# 772238

Enc. Submitted documents

c: 3 Requesters
(w/o enclosures)

2 Third Parties
(w/o enclosures)